STATE OF MICHIGAN

IN THE SUPREME COURT FOR THE STATE OF MICHIGAN

KEITH W. MAYBERRY and
JOANNA MAYBERRY, his wife,

Plaintiffs/Appellant,

v

GENERAL ORTHOPEDICS, P.C.,
a Michigan Professional Corporation, and
DR. WILLIAM M. KOHEN, M.D.,
Jointly and Severally,

Defendants/Appellees.

Supreme Court No.: 126136
Court of Appeals No. 244162
Oakland Cty Circuit Case No. 02-039236-NH

126136

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PLAINTIFF/APPELLANTS' SUPPLEMENTAL BRIEF AS REQUESTED BY ORDER OF THIS COURT PURSUANT TO MCR 7.302

PROOF OF SERVICE

EXHIBITS

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STATEMENT OF ORDERS APPEALED FROM JURISDICTION AND RELIEF SOUGHT

Plaintiff/Appellants, *Keith* and *Joanna Mayberry*, file this Application for Leave to Appeal pursuant to MCR 7.302(b)(5). This Application is made from the Court of Appeals Order denying their *Motion for Reconsideration*. **(See Exhibit 1 - Court of Appeals Order dated March 30, 2004)** The *Motion for Reconsideration* followed the Court of Appeals opinion and order affirming the Trial Court's dismissal of all claims upon the request of the Defendant/Appellees *Motion for Summary Disposition*. The Court of Appeals entered this Order on February 17, 2004. **(See Exhibit 2 - Court of Appeals Unpublished Opinion)** Plaintiff/Appellants initial appeal was from the Trial Court's order granting Summary Disposition on September 24, 2002 **(See Exhibit 3 - Circuit Court Order)**

The Defendants' Motion centered around the application of MCL 600.2912(b) et seq; MCL 600.5856(d) et seq; the effect of the tolling provision upon the filing of a subsequent Notice of Intent to Sue; the effect of the tolling provision upon discovery of additional parties and claims. The hearing on this Motion was held on September 4, 2002 and the transcript has been attached. **(See Exhibit 4 - Transcript of Motion for Summary Disposition)**

The Supreme Court has jurisdiction over this matter pursuant to MCR 7.302(b)(5). As will be shown below, the decision of the Court of Appeals is clearly erroneous and will cause material injustice to the Plaintiff/Appellants. Therefore, the Plaintiff/Appellants respectfully request that the Order of Dismissal granted by the Oakland County Circuit Court and affirmed by the Court of Appeals be reversed with all proceedings be remanded back to Circuit Court for further proceedings.

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Upon order of this court, the parties have been advised that Application for Leave to Appeal is being considered pursuant to MCR 7.302(G)(1). The parties were also informed that the clerk is to schedule oral argument regarding whether to grant the application or take other peremptory action as permitted by MCR 7.302(G)(1). Finally, by order of this court, the parties were informed that they were to file supplemental briefs discussing the following issues:

(1.) Whether a Notice of Intent filed when more than 182 days remain in the limitation period has the effect of tolling the period by operation of MCL 600.5856(d);

(2.) Whether the prohibition of tacking successive 182 day periods set forth in MCL 600.2912(b)(6) applies to a subsequent Notice of Intent filed after a prior Notice has expired and when fewer than 182 days remain in the limitation period; and

(3.) Whether under MCL 600.5856(d) the filing of a Notice of Intent filed when fewer than 182 days remain in the limitation period has the effect of tolling the period if a prior Notice of Intent did not trigger a tolling.

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QUESTIONS PRESENTED FOR REVIEW

Question I.:

Whether a Notice of Intent filed when more than 182 days remain in the limitation period has the effect of tolling the period by operation of MCL 600.5856(d);

Question II.:

Whether the prohibition of tacking successive 182 day periods set forth in MCL 600.2912(b)(6) applies to a subsequent Notice of Intent filed after a prior Notice has expired and when fewer than 182 days remain in the limitation period.

Question III.:

Whether, under MCL 600.5856(d), a filing of a Notice of Intent filed when fewer than 182 days remain in the limitation period has the effect of tolling the period if a prior Notice of Intent did not trigger a tolling.

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STATEMENT OF FACTS

The Mayberrys' cause of action is a claim for medical malpractice arising out of the care and treatment that Mr. Mayberry received from the Defendant/Appellees on November 2, 1999, November 18, 1999, November 22, 1999, December 2, 1999 and December 10, 1999. **(See Exhibit 5 - Plaintiff's Complaint)** On November 2, 1999, Mr. Mayberry presented to the Defendant Kohen when he suffered a fractured wrist as a result of a fall. **(See Exhibit 5)** Defendant Kohen attempted a closed reduction and assured Mr. Mayberry that no surgery was necessary. (Id.)

Mr. Mayberry returned to Defendant Kohen's office for a follow-up appointment on November 18, 1999. (Id.) X-Rays revealed a shift in the bone of his wrist and that surgery would be necessary to straighten it. (Id.)

On November 22, 1999 Mr. Mayberry underwent closed reduction and an application of an external fixture to his wrist. (Id.)

Intra-operatively, Defendant Kohen noted a "troubling interior spike" and median nerve symptoms. Defendant Kohen failed to decompress the wrist. (Id.)

On December 2, 1999, Mr. Mayberry returned for his first post operative visit. At that time he had complete numbness of his hand and was unable to bend or extend his fingers. (Id.) Defendant Kohen suggested a second opinion be sought. Mr. Mayberry was seen for a second opinion and was taken back for additional surgery on December 10, 1999. (Id.) Surgical findings included a cut in the superficial radius nerve and severely compressed nerves throughout the compartmental area. (Id.) Mr. Mayberry required a plate and screw fixation of the wrist.

As a result of the delay in treatment and failure to decompress the wrist, Mr. Mayberry

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has been left with loss of range of motion, loss of function, RSD, stiffness and carpel tunnel like problems. (Id.)

On June 21, 2000, Benjamin T. Hoffiz, Jr., Esq. filed and served a Notice of Intent to Sue upon Defendant William Kohen, M.D., only, asserting **merely one** violation of the standard of care. **(See Exhibit 6 - Notice of Intent to Sue by Benjamin T. Hoffiz, Jr., Esq.)**

On October 11, 2001, pursuant to MCL 600.2912(b), Blum, Konheim & Elkin, timely serve a Notice of Intent to Sue upon the Defendants Dr. Kohen and General Orthopedics, P.C., and asserted additional violations of the standard of care which were not previously asserted. **(See Exhibit 7 - October 2001 Notice of Intent to Sue)**

On October 12, 2001, the Defendants, Dr. William Kohen and General Orthopedics, P.C., received Mr. Mayberrys' Notice of Intent to Sue. **(See Exhibit 8 - Certificate of Return Service)**

The applicable Statute of Limitation in this matter was set to expire, at the earliest, on November 21, 2001. **(See MCL 600.5805)** However, pursuant to MCL 600.5856 and *Omelenchuck v City of Warren, 461 Mich 567; 609 NW2d 177 (2000)*, the applicable Statute of Limitation should have been tolled as to all of the claims asserted against Defendant Dr. Kohen and the newly added party, Defendant General Orthopedics P.C.

On March 19, 2002, after the expiration of the applicable Notice period, the Mayberrys' filed their Complaint against the named Defendants. **(See Exhibit 5)** Subsequently, on or about April 4, 2002, the named Defendants filed their *Motion for Summary Disposition* pursuant to MCR 2.116(c)(7), (8) & (10). The Defendants' *Motion for Summary Disposition* sought dismissal of the Mayberrys' Complaint due to an alleged failure to comply with the applicable

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Statute of Limitation. **(See Exhibit 9 - Defendants' Motion for Summary Disposition)** On May 1, 2002, the Mayberrys' filed their *Response to Defendants' Motion for Summary Disposition* stating that the Defendants' argument was in error and that the Mayberrys' were entitled to a tolling of the applicable Statute of Limitations during the Notice period. **(See Exhibit 10 - Plaintiffs' Response to Defendants' Motion for Summary Disposition)** On May 3, 2002, Defendants' filed their reply to *Plaintiff's Response to Defendants' Motion for Summary Disposition*. **(See Exhibit 11 - Defendants' Reply)** On September 4, 2002 a hearing was heard before the Oakland County Circuit Court. At that time, Judge MacDonald granted the Defendants' *Motion for Summary Disposition*. **(See Exhibits 3 and 4)**

On January 8, 2003, the Mayberrys' filed their Appeal seeking reversal of the trial court's order granting the Defendants' *Motion to Dismiss*. **(See Exhibit 12 - Plaintiff/Appellant's Brief)** On February 12, 2002, Defendant/Appellees filed their *Response* to the Mayberrys' *Claim of Appeal*. **(See Exhibit 13 - Defendants' Response)** On February 17, 2004, without the benefit of oral argument, the Court of Appeals affirmed the trial court's granting of Defendants' *Motion for Summary Disposition*. **(See Exhibit 2)** On March 9, 2004, Plaintiffs filed their *Motion for Rehearing,* pursuant to MCR 7.215(H)(1) stating that the Court of Appeals' decision was clear palpable error. **(See Exhibit 14 - Plaintiff/Appellant's Motion for Reconsideration)** On March 30, 2004, the Court of Appeals denied Plaintiff's *Motion for Reconsideration*. **(See Exhibit 1)**

On May 10, 2004, Plaintiff/Appellant's filed their *Application for Leave to Appeal to the Supreme Court* pursuant to MCR 7.302.

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On order of this court, the *Application for Leave to Appeal* is being considered and pursuant to MCR 7.302(G)(1), this court has directed the clerk to schedule oral argument. Furthermore, this court has requested *Supplement Briefs* discussing the specific issues set forth above.

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STANDARD OF REVIEW

Plaintiff/Appellants file this *Supplemental Brief* pursuant to this court's order entered on December 3, 2004 requesting *Supplemental Briefs* to discuss the above-stated issues pursuant to MCR 7.302(G)(1). As this court is aware, grounds for said *Application for Leave to Appeal* is based upon the Court of Appeals decision which was clearly erroneous and will cause material injustice should it stand. **(See MCR 7.302(b)(5))**

In this matter, the Court of Appeals affirmed the Trial Courts' granting of summary disposition pursuant to MCR 2.116(c)(7), (8) & (10). A review of such decisions on Summary Disposition Motions is de novo. *Thane v Detroit Library Commission, 465 Mich 68, 74; 631 NW2d 678 (2001).* The court must consider all documentary evidence submitted by the parties accepting as true the contents of their Complaint unless Affidavits or other appropriate documents specifically contradict them. *Sewell v Southfield Public Schools, 456 Mich 67, 674; 576 NW2d 153 (1998).*

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LAW AND ARGUMENT

I.

Whether a Notice of Intent filed when more than 182 days remain in the limitation period has the effect of tolling the period by operation of MCL 600.5856(d).

The clear and unambiguous language of MCL 600.5856(d) controls when tolling of the applicable Statute of Limitations should occur. In fact, MCL 600.5856(d) does not become operational unless the Statute of Limitations or repose would expire "during the applicable Notice period provided under section 2912(b)." If the applicable Notice period expires prior to the expiration of the Statute of Limitation, **then MCL 600.5856 is of no consequence** and, therefore, tolling does not occur. Moreover, since no tolling can occur unless the Statute of Limitations expires during the applicable Notice period there can be no "tacking" as specifically written in MCL 600.2912(b)(6). That being the case, MCL 600.2912(b)(6) does not apply to the Mayberrys' situation.

MCL 600.5856 in pertinent part states as follows:

> "The Statute of Limitations or repose are tolled subsection (d) if during the applicable Notice period under section 2912(b), a claim would be barred by the Statute of Limitations or repose, for not longer than a number days equal to the number of days in the applicable Notice period after the date Notice is given in compliance with section 2912(b)."

In interpreting this statute, the Michigan Supreme Court has held that if the Statute of Limitations does not expire during the applicable Notice period, then MCL 600.5856(d) does not apply and no tolling occurs. This Supreme Court in *Omelenchuck, supra*, held as follows:

> "That clause sets forth the circumstances in which MCL 600.5856(d) is applicable. Thus, if the interval when a potential Plaintiff is not allowed to sue ends before the limitation period ends (i.e. if notice is given more than 182 days before the end of the limitation period) then **MCL 600.5856(d) is of no consequence."**

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> "In that circumstance, the limitation period is unaffected by the fact that, during that period, there occurs an interval when a potential Plaintiff cannot file suit." (Id.)

MCL 600.5856 read in conjunction with this court's ruling in *Omelenchuck, supra* specifically holds that the applicable limitation period does not affect the tolling of the period of limitations by operation of MCL 600.5856(d) when the Notice of Intent is filed with more than 182 days remaining in the Statute of Limitations period. Thus, no tolling of the Statute of Limitations can occur when a given Plaintiff files a Notice of Intent to Sue with more than 182 days remaining on the applicable Statute of Limitations.

In this case, the fact that the Mayberrys' filed a previous Notice of Intent to Sue in June of 2000 had absolutely **no effect** on the applicable Statute of Limitations. **MCL 600.5856 was of no consequence** to the Mayberrys' applicable Statute of Limitations.

Since the Statute of Limitation applicable to the Mayberrys was never tolled after the filing of the June of 2000 Notice of Intent, there could be no "tacking" or "addition of successive 182 day periods" which Defendants and this Court of Appeals rely upon in MCL 6002912(b)(6). Therefore, when the two statutes are read together, one is able to discern the clear and unambiguous language as to when both sections should be applied. Read together, MCL 600.2912(b)(6) only has consequence after MCL 600.5856 has been applied. Since MCL 600.5856 had no consequence concerning the Mayberrys' Statute of Limitation after the filing of the June of 2000 Notice of Intent to Sue, neither should MCL 600.2912(b)(6).

Therefore, it is clear from the statute language itself as well as this court's ruling in *Omelenchuck, supra* that when a Notice of Intent is filed with more than 182 days remaining in the limitation period there is no affect on the tolling of that period by operation of MCL 600.5856(d).

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II.

Whether the prohibition of tacking successive 182 day periods set forth in MCL 600.2912(b)(6) applies to a subsequent Notice of Intent filed after a prior Notice period has expired and when fewer than 182 days remain in the limitation period.

From the plain language of MCL 600.2912(b)(6) itself, it is clear that the prohibition against tacking successive 182 day periods only applies when used in conjunction with MCL 600.5856(d), the tolling statute. The Legislature was clear and unambiguous in using the phrase **"tacking"** which specifically denotes **a use to avoid the bar of a Statute of Limitations.** Furthermore, MCL 600.2912(b)(6) is specific in its wording in that it applies to only **"that"** claim and **"those health professionals and facilities notified in the initial notice."** It does not speak to additional claims and/or additional health professionals or health facilities who were not a part of the initial notice. Therefore, the prohibition against tacking successive 182 day periods set forth in MCL 600.2912(b)(6) does not apply to a subsequent notice of intent filed after a prior notice period has expired and when fewer than 182 days remain in the limitation period. The Court of Appeals and the trial courts decision should be reversed.

MCL 600.2912(b)(6) states as follows:

> "After the initial notice is given to "a" health professional or health facility under this section, the **"tacking or addition of successive 182 day periods"** is not allowed irrespective of how many additional notices are subsequently filed for **"that claim"** irrespective of the number of health professionals or health facilities **"notified." (Emphasis added)**

Implicit in its reading, MCL 600.2912(b)(6) states that a tolling has already taken place. "When the language is unambiguous, we must enforce the meaning plainly expressed, and judicial construction is not permitted." *Hinkle v Wayne County Clerk, 467 Mich 337, 340; 654*

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NW2d 315 (2002) Thus, the Legislature's use of the word **"tacking"** and/or **"addition of successive 182 day periods"** cannot be overlooked. Black's Law Dictionary, 5th Edition defines the use of "tacking" as follows:

> "The term is also used in a number of other connections as of possessions, disabilities or items and accounts or other dealings. In these several **cases, the purpose of the proposed tacking is to avoid the bar of a statute of limitations.**" (See *Davis v Coblens, 174 US 719; 19 S.Ct. 832; 43 L.Ed. 1147*) (See Black's Law Dictionary - 5th Edition, Pg. 1302 (1979))

Furthermore, Webster's New College Dictionary defines "tacking" that as follows:

> "To add as an extra item." (See Webster's New College Dictionary, copy right 1986; Pg. 1121)

Webster's goes further and defines "successive" as follows:

> "Following an uninterrupted order or sequence." (See Webster's New College Dictionary, copy right 1986; Pg. 1101)

Certainly, the Legislature's choice to use these specific words and phrases implores one to give meaning to each word as ordinarily defined. Defendants' position inexplicably **glosses** over the Legislatures specific uses of the word **"tacking"** and phrase **"addition of successive 182 day periods"** when it proffers its position that MCL 600.2912(b)(6) applies to Mr. Mayberrys' claim. This court has been consistent in its textulist approach to interpreting each and every word used by the Legislature when interpreting Michigan Statutes. In *Jenkins v Patel, 471 Mich 158; 684 NW2d 346 (2004)*, this court held:

> "Courts must give effect to every word, phrase and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory."

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As this court is aware, the *Jenkins, supra* case involved interpreting medical malpractice non-economic damages cap, MCL 600.1483(1) in its application to the wrongful death statute, MCL 600.2922 in areas of medical malpractice.

In *Kreiner v Fischer, 471 Mich 109; 471 Mich 1201; 683 NW2d 611(2004)*, this court held "in construing statutes, we examine the language the Legislature has used. That language is the best indicator of the Legislature's intent." **(See *Kreiner* at Page 9)** As this court is aware, the issue in the *Kreiner, supra* case surrounded this court's interpretation of MCL 600.3135 concerning issues of serious impairment of an important body function.

In *Halloran v Bhan, 470 Mich 572; 683 NW2d 129 (2004)* this court held as follows:

> "When facing issues regarding statutory interpretation, this court must give effect to the Legislature's intent as expressed in the statutory language." . . . "undefined statutory terms must be given their plain and ordinary meaning, and it is proper to consult a dictionary for definitions."

As this court is aware, the issue in *Halloran v Bhan, supra* involved this court's interpretation of MCL 600.2169(1)(a) and the qualification of experts involving medical malpractice claims.

Thus, it is clear when this court interprets Michigan statute, regardless of the statute involved, this court looks to the clear language as it is used in ordinary means. Furthermore, it is clear that this court gives effect to each and every word used by the Legislature when interpreting what that Legislature's intent should be.

Turning to MCL 600.2912(b)(6), the Legislature used the terms "tacking" and "addition of successive 182 periods." This being the case, it is clear the Legislature wish to give those terms meaning. Read logically, the Legislature intended that MCL 600,2912(b)(6) only apply

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when an actual tolling of the Statute of Limitations had already taken place. Should this not be the case, the Legislature easily could have removed the terms "tacking" or "addition of successive 182 periods" and simply said "only one 182 day period is allowed." The fact that the Legislature selected such specific terms such as "tacking" and "addition of successive 182 periods" establishes that once a tolling has occurred the "tacking" or "addition or successive" 182 day periods to prolong the Statute of Limitations would not be allowed. Therefore, unless an actual tolling of the Statute of Limitations has taken place, MCL 600.2912(b)(6) does not apply.

In this case, the Mayberrys were entitled to a tolling of the Statute of Limitations pursuant to MCL 600.5856 when they filed their Notice of Intent to Sue in **October of 2001.** As this court is aware, the October of 2001 Notice of Intent to Sue was the only Notice of Intent to Sue which did toll the applicable Statute of Limitations. The prior Notice of Intent to Sue filed in June of 2000 did not enact MCL 600.2912(b)(6) and, thus, the "tacking" or "addition of successive 182 day periods" occurred. Therefore, the Court of Appeals and trial court's reliance on this statute is misplaced and clear palpable error.

Additionally, MCL 600.2912(b)(6) is narrow in its scope. It speaks to the initial notice period given to "a health professional or health facility" for "that claim." It does not speak to "all health professionals" or "any and all claims." Therefore, the Court of Appeals' reliance on MCL 600.2912(b)(6) to dismiss the Mayberrys' newly raised claims and the newly added Defendant is an unconstitutional broadening of MCL 600.2912(b)(6). This rewrite was not intended by the Legislature and constitutes clear palpable error. The correct reading of the above-statute is that after the initial tolling of the Statute of Limitations, no "tacking" or "addition of successive 182 day periods" to further toll the Statute of Limitation by filing subsequent Notices of Intent will be allowed.

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As this court is aware, if a medical malpractice Plaintiff fails to comply with MCL 600.2912(b) before filing a Complaint, the Circuit Court does retain subject matter jurisdiction and thereby dismissal without prejudice is appropriate. *Neal v Oakwood Hospital Corporation, 226 Mich App 701, 714, 715; 575 NW2d 68 (1998).*

Furthermore, the Michigan Court of Appeals in *Rheaume v Vandenberg; 232 Mich App 417; 591 NW2d 331 (1999)* has made it abundantly clear that strict compliance with MCL 600.2912(b) is required or else dismissal is appropriate. Thus, the additional claims asserted against Defendant Dr. Kohen and the new party, Defendant General Orthopedics, P.C., must receive a Notice of Intent to Sue prior to any claim being filed. Furthermore, Defendant Kohen and Defendant General Orthopedics are entitled to the 182 day no suit period prior to the Mayberrys filing a Complaint against them pursuant to MCL 600.2912(b)(1).

Read correctly, MCL 600.2912(b)(6) bars the tacking or addition of successive 182 day periods "after the initial notice is given to 'a health professional or health facility." Irrespective of how many additional notices are subsequently filed for "that claim." **(Emphasis added)** Thus, the Legislature limited the tacking or additional successive 182 day periods to toll the limitation only after tolling of the Statute of Limitations had already occurred. Furthermore, the Legislature did not take away a health professional or health facilities right to receive the 182 day no suit period to investigate a potential medical malpractice claim by the passage of MCL 600.2912(b)(6).

As this court is aware, the purpose of the Notice of Intent to Sue no suit period has been referenced in multiple case, but specifically in *Neal v Oakwood Hospital Corporation, supra.* The *Neal, supra* court held as follows:

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> "The purpose of the Notice requirement is to promote settlement without the need for formal litigation and reduce the cost of medical malpractice litigation while still providing compensation for meritorious medical malpractice claims that might otherwise be precluded from recovery because of litigation costs." **(See *Neal, supra* at Pg. 705)**

The Notice period created by the Legislature in MCL 600.2912(b)(1) is an attempt to allow parties to facilitate settlement or negotiation or at the very least to investigate potential medical malpractice claims prior to litigation. Make no mistake, this 182 day period is a **no suit period** which prevents the Plaintiff from filing a medical malpractice claim which is a substantive right. Prior to 1993, Plaintiff was entitled to file his or her medical malpractice claim up until the expiration of the two year Statute of Limitations. Thus, the passage of MCL 600.2912(b)(1) effectively provides certain substantive rights to the Defendants to investigate medical malpractice claims prior to a suit being filed. That is the purpose of the 182 day no suit period.

In this case, without notice to General Orthopedics, P.C., or to Defendant Kohen, the Defendants would be denied their statutory right to investigate said claim and work towards resolution pre-suit. Certainly, the Legislature did not intend for newly discovered parties to be denied their substantive right to notice and the applicable no suit period simply because a given Plaintiff happened to file a Notice of Intent to Sue upon a different health professional or failed to assert any and all claim in the prior Notice. This would be the result if this Court were to rule in accordance with the Court of Appeals, the Trial Court and with the panel in *Orta v HealthOne Medical Center, P.C., et al, 2002 WL 236025, Mich App, unpublished* and attached as Exhibit 15. **(See Exhibit 15 - *Orta, supra* Opinion)**

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Furthermore, the error in the Court of Appeals' and the Trial Court's ruling is clear when one evaluates it outside the perimeters of medical malpractice. For example, a Plaintiff may file as many complaints alleging general negligence against various parties asserting various theories of liability all arising out of the same incident up until the date the expiration of the applicable Statute of Limitation period has passed. Clearly, the Legislature did not intend to limit the Plaintiff's right to file a cause of action against various parties merely because it happens to be a medical malpractice claim. In fact, MCL 600.2912(b)(3) indicates that a Plaintiff is entitled to file a claim against additional healthcare professionals, as well as, assert additional claims newly discovered during the pendency of litigation. Furthermore, MCL 600.2912(b)(3) indicates that the new Defendant or old Defendant who is having to defend newly discovered claims **is entitled to a shortened no suit period despite being in suit.**

Therefore, when one reads MCL 600.2912(b) in its entirety, the Plaintiff should be allowed to file as many Notices of Intent to Sue alleging as many different theories of liability against any and all parties up until the date in which the Statute of Limitations expires. Then the only Notice of Intent to Sue which would be entitled to a tolling would be a Notice of Intent to Sue which was filed and actually received a tolling of the Statute of Limitations pursuant to MCL 600.5856. **This would give the maximum effect to the Legislature's intent in passing MCL 600.2912(b).**

Should this court take the Defendants' position and rule that Plaintiff is entitled to only one Notice of Intent to Sue and in that Notice of Intent to Sue he must name any and all potential claims as well as any and all potential Defendants, it would not necessitate quick resolution nor provide Defendants with the earliest possible notice of a potential claim. Such an interpretation

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would require that a savvy Plaintiff's attorney investigate the claim during the entire two year Statute of Limitations and wait to file the Notice of Intent to Sue at or near the very last possible date possible to obtain the maximum benefit of MCL 600.5856. This **would not facilitate early resolution of potential medical malpractice claims** and it would not promote prompt Notice to Defendant of potential claims. This clearly was not the intent of the Legislature by the passage of MCL 600.2912(b). This is why the Court of Appeals reliance on MCL 600.2912(b)(6) is misplaced and in clear error.

Finally, the Court of Appeals reliance upon *Ashby v Byrnes, M.D., 251 Mich App 537; 651 NW2d 22 (2002)* is also misplaced. *Ashby, supra,* fails to address the issue as to whether or not MCL 600.2912(b)(6) unconstitutionally shortens the Plaintiff's medical malpractice Statute of Limitations in regards to additional healthcare facilities subsequently Notified or additional claims subsequently discovered after the filing of a prior Notice of Intent to Sue. Furthermore, *Ashby, supra* fails to address the situation in which additional Notices are provided to other health professional or health facilities in regards to newly asserted claims as opposed to a claim which was already noticed in the prior Notice of Intent to Sue. *Ashby, supra* fails to address and resolve the conflict caused by the Court of Appeals interpretation of MCL 600.2912(b); MCL 600.2912(b)(3), MCL 600.2912(b)(6) and MCL 600.5856. **(See *Ashby v Byrnes, M.D., 251 Mich App 537; 651 NW2d 22 (2002)*)**

Furthermore, *Ashby, supra* does not address the health professionals or health facilities right to 182 day Notice period to investigate and potentially resolve medical malpractice claims prior to suit. It is clear from the unambiguous language of MCL 600.2912(b) the Legislature did not intend for additionally named health professionals or health facilities to forfeit their 182 day

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period merely because the Plaintiff happened to file a prior Notice of Intent to Sue upon a different party.

Finally, and most disturbing, the Court of Appeals in *Ashby, supra* **glossed over** the clear and unambiguous language of MCL 600.2912(b)(6) in regards to the "tacking" and/or "addition of successive 182 day Notice period." Furthermore, it glossed over the fact that MCL 600.2912(b)(6) is a narrowly draw statute. This interpretation flies in the face of this Supreme Court's **consistent textualist approach** in interpreting unambiguous language of Michigan Statutes. The fact that the Court of Appeals panel in *Ashby, supra* failed to give the proper effect to the specific language used by our Legislature is inconsistent with this Supreme Court's approach to the interpretation of Michigan statutes and should be revisited.

Therefore, for the reasons stated above, it is clear that the prohibition against tacking successive 182 day periods set forth in MCL 600.2912(b)(6) does not apply to a subsequent Notice of Intent filed after a prior Notice period has expired and when fewer then 182 days remain in the limitation period.

III.

Whether, under MCL 600.5856(d), the filing of a Notice of Intent filed when fewer than 182 days remain in the limitation period has the effect of tolling the period if a prior Notice of Intent did not trigger a tolling.

Mr. and Mrs. Mayberrys' claim for medical malpractice against the named Defendant was timely filed in that pursuant to MCL 600.5805; MCL 600.2912(b); and MCL 600.5856(d), Mr. and Mrs. Mayberry were entitled to a tolling of the applicable Statute of Limitations during the "applicable notice period" despite the filing of a prior Notice of Intent which did not trigger such

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a tolling. As previously indicated, Plaintiffs are entitled to a tolling pursuant to MCL 600.5856(d) if "during the applicable Notice period" the Statute of Limitations expires. The Mayberrys' filed their Notice of Intent to Sue in October of 2001 with the Statute set to expire during the applicable Notice of Intent period. Therefore, the Mayberrys' were entitled to a tolling of the Statute of Limitations and their cause of action was timely filed.

The Statute of Limitations for a medical malpractice claim is set forth in MCL 600.5805. MCL 600.5805(4) states in part as follows:

> "Except as otherwise provided in this chapter, the Statute of Limitations is two years for an action of malpractice." **(See MCL 600.5805(4))**

However, because the Mayberrys' cause of action is a claim for medical malpractice there are additional requirements that must be met prior to filing a Complaint against a healthcare professional or healthcare facility. **(See *Neal, supra*)** Pursuant to MCL 600.2912(b)(1), Plaintiff must file a Notice of Intent to Sue upon the various healthcare professionals and is thereafter barred from filing a Complaint not less then 182 days before said Notice is received. MCL 600.2912(b) states as follows:

> "Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced."

Read together, these two statutes would have effectively shortened Plaintiff's cause of action for medical malpractice to 18 months as opposed to the twenty-four month Statute of Limitations as stated in MCL 600.5805. However, to combat this shortening of the applicable Limitations period, the Michigan Legislature enacted MCL 600.5856. As this court is aware,

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MCL 600.5856 states as follows:

> "MCL 600.5856. The Statute of Limitations or reposed are tolled: (d) If, during the applicable Notice period under section 2912(b), a claim would be barred by the Statute of Limitations or repose, for not longer than a number of days equal to the number of days in the applicable Notice period after the date Notice is given in compliance with section 2912(b)."

Therefore, when correctly read, Plaintiff is entitled to a tolling of the applicable Statute of Limitations if the Statute of Limitations expires "during the applicable Notice period" as provided under section 2912(b). **(See *Omelenchuck v City of Warren, supra*)** As reasoned by the Supreme Court in *Omelenchuck, supra*, the Legislature surely did not intend its tolling provision as a trap for the unweary. **(See Footnote 19 of *Omelenchuck, supra*)** Therefore, this Supreme Court held as follows:

> "If, however, the interval when a potential Plaintiff is not allowed to file suit would end after the expiration of the limitation period, i.e. if notice is given 182 days or less before the end of the limitation period, then MCL 600.5856(d) applies. In that instance, the limitation period is tolled."

In this case, the Mayberrys' complied with the requirements of MCL 600.2912(b); MCL 600.5805; and MCL 600.5856. The Mayberrys' filed their Notice of Intent to Sue upon General Orthopedic, P.C. and Defendant William Kohen, M.D. on October of 2001. The Statute of Limitations in this matter was not set to expire until at the very earliest November of 2001. Therefore, pursuant to MCL 600.5856, since the Statute of Limitations would expire during the "applicable Notice period under section 2912(b)," the Mayberrys' were entitled to a statutory tolling period of the 182 day no suit period. Therefore, when the Mayberrys' filed their Complaint in March 2002, their Complaint was timely. The fact that a prior Notice of Intent to

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Sue had been filed against Defendant Kohen, **which did not toll the Statute of Limitations,** is of no consequence in this matter because it was not the "applicable Notice period under section 2912(b)" which MCL 600.5856 speaks to.

Furthermore, as previously indicated, this court has consistently applied a textualist approach to interpreting various Michigan statutes. That being the case, one must look to the exact language of MCL 600.5856 as to when a tolling period actually applies. As quoted above, the Statute of Limitations or repose are tolled if "during the applicable Notice period under section 2912(b). . ." This section is clear that a tolling of the Statute of Limitations is appropriate when that Statute of Limitations expires **"during the applicable Notice period."** This portion of the statute does not indicate that it applies only to the "initial" Notice period but merely to the "applicable Notice period under section 2912(b)."

This analysis is strikingly similar to the Michigan Supreme Court's analysis in *Eggleston v Biomedical Applications of Detroit, Inc., 468 Mich 29; 658 NW2d 139 (2003).* In *Eggleston, supra,* this Supreme Court reversed the Michigan Court of Appeals decision indicating that its interpretation of MCL 600.5852 was too expansive. This court ruled as follows:

> "The court relied on this misquotation holding that a personal representative must bring an action within two years after the **initial** Letters of Authority are issued to the first personal representative. . ."
>
> "This is not, however, what the Statute said. The Statute simply provides that an action may be commenced by the personal representative "at any time within two years after Letters of Authority are issued although the Statute of Limitations has run."
>
> "The language adopted by the Legislature clearly allows an actions to be brought within two years after Letter of Authority are issued to the personal representative. The Statute does not provide that the two year period is measured the date Letters of Authority are issued to the initial personal representative." **(See *Eggleston, supra* at Pg. 33)**

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The Defendants in this matter and the Court of Appeals attempt to broaden the interpretation of MCL 600.5856 by requiring that it only applies to the initial Notice period provided under section 2912(b). Similar to the Court of Appeals in *Eggleston, supra*, such an interpretation expands upon the actual and specific language written by the Michigan Legislature. Similar to this court's interpretation of *Eggleston, supra,* this Court should hold that MCL 600.5856 applies during any "applicable Notice period under section 2912(b)," not merely the initial Notice period under section 2912(b). That being the case, Mayberrys' Notice of Intent to Sue which was filed when fewer than 182 days remained in the limitation period and was the only Notice of Intent permitted to receive a tolling, did have the effect of tolling the period despite a prior Notice of Intent which did not trigger such a tolling.

The Defendants in this matter as well as the Court of Appeals and the trial court suggest that MCL 600.5856(d) does not apply to Plaintiff's cause of action because the initial Notice of Intent to Sue period which was filed in June of 2000 expired prior to the running of the applicable Statute of Limitation. Therefore, pursuant to *Omelenchuck, supra*, MCL 600.5856 is "of no consequence." **(See *Omelenchuck, supra* at Pg. 574)** They dovetail this analysis with a misinterpretation of MCL 600.2912(b)(6). Their analysis seems to state that if Plaintiff files an initial Notice of Intent to Sue, which does not trigger the tolling statute, Plaintiff is not entitled to file a subsequent Notice of Intent to Sue alleging different claims and against different individuals not named in the prior Notice of Intent to Sue However, as noted above, Defendants' interpretation leads to an **inconsistent** and **disjunctive** reading of MCL 600.2912(b) et seq.

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Furthermore, as this court correctly set forth in *Omelenchuck, supra,* a particular portion of the medical malpractice statute may be of no consequence to a given claim. This Court held as follows

> "If the interval when a potential Plaintiff is not allowed to sue ends before the limitation period ends, (i.e. if Notice is given more than 182 days before the end of the limitation period) then MCL 600.5856(d) is of no consequence."

Similarly, this court should use consistent reasoning when interpreting the application of MCL 600.2912(b)(6) pursuant to the specific language of the Statute itself. As previously indicated in Issue II, the language of 2912(b)(6) specifically mentions the necessity of "tacking" or "addition of successive 182 day periods." In fact, 2912(b)(6) specifically bars the "tacking" or "addition of successive 182 day periods." However, **if no "tacking" or "addition of successive 182 day period occurs," then MCL 600.2912(b)(6) should be of no consequence.** Therefore, MCL 600.5856 would still apply if a given Statute of Limitations or repose would expire "during the applicable Notice period under section 2912(b);" regardless of a prior Notice of Intent to Sue had been filed.

In this case, the Mayberrys' Notice of Intent to Sue, filed pursuant to MCL 600.2912(b) and with fewer than 182 days remaining within the applicable limitation period should have received the effect of the tolling provision of MCL 600.5856(d) despite the fact that a prior Notice of Intent did not trigger such a tolling. Defendant Kohen received a Notice of Intent to Sue alleging one violation of the standard of care in June of 2000. Absolutely no tolling of the applicable Statute of Limitations took place as a result of this filing. In October of 2001, a second Notice of Intent to Sue was served upon Defendant Kohen asserting additional violations

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of the standard of care and injuries. The October Notice of Intent to Sue was also served upon **the newly added Defendant, General Orthopedics, P.C.** MCL 600.2912(b)(1) required the Mayberrys to serve the October Notice of Intent to Sue upon the Defendant Dr. Kohen and the Defendant General Orthopedics, P.C. Accordingly, the Mayberrys' were barred from filing their medical malpractice claim against Defendant Dr. Kohen and the newly added Defendant, General Orthopedics, P.C. until the 182 day Notice period expired. Pursuant to MCL 600.5856(d), the Mayberrys' should have received a tolling of the Statute of Limitations due to the fact that their limitation period expired during the "applicable Notice period."

However, the trial court and the Court of Appeals' ruling inappropriately expanded MCL 600.5856(d) and summarily dismissed the Mayberrys' Complaint as untimely. This ruling has placed the Plaintiffs in a "catch-22" situation when newly discovered claims and newly discovered Defendants are found after the filing of a prior Notice of Intent to Sue. If the Mayberrys' filed their Complaint for medical malpractice against the Defendants, General Orthopedics, P.C. and asserted the additional claims against Defendant Dr. Kohen without providing the Notice required under MCL 600.2912(b), their Complaint would be dismissed pursuant to *Neal, supra*. The Mayberrys' correctly avoided such a result by filing the appropriate Notice of Intent to Sue asserting additional claims against Defendant Dr. Kohen and naming the additional Defendant, General Orthopedics, P.C. Consequently, pursuant to MCL 600.2912(b)(1), the Mayberrys were forbidden from filing this Complaint during the 182 day notice period. This was done with the full expectation of receiving a tolling pursuant to MCL 600.5856(d).

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The lower Court's current decision holds that the Mayberrys' actions were incorrect and in violation of MCL 600.2912(b)(6) despite no actual tolling taking place. Regardless of which way the Mayberrys' would have acted, their claims would have been subject to dismissal. This is not what is intent of the Legislature in passing MCL 600.2912(b). "Such an interpretation clearly creates a consequence so harsh and unreasonable that it has effectively divested Plaintiff access to courts intended by the granting of substantive rights." (*Bissell v Kommareddi, M.D., 202 Mich App 578, 581; 509 NW2d 542 (1994)*).

Furthermore, allowing Plaintiff to file additional Notices of Intent to Sue upon newly found parties and adding additional claims prior to the running of the applicable Statute of Limitations accomplishes the intent of the Legislature in passing MCL 600.2912(b). As previously pointed out, the intent of MCL 600.2912(b) is an attempt to proliferate investigation and potential settlement pre-suit. This is accomplished best if Plaintiffs are entitled to file as many Notices of Intent as necessary to apprize the appropriate health professionals or health facilities of any and all claims. Thereafter, the only Notice of Intent to Sue which would be entitled to tolling would be that which would be filed if the applicable Notice period expired after the running of the Statute of Limitations. This interpretation empowers the Statute to carry out the purpose for which is was intended by the Legislature.

Moreover, such an interpretation is consistent with MCL 600.2912(b)(3) which lawfully shortens the Notice of Intent to Sue period when newly discovered health professionals are added while a suit is already pending. MCL 600.2912(b)(3) states as follows:

> "The 182 day Notice period required in subsection (1) is shortened to 91 days if all the following conditions exists:

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(A.) Claimant has previously filed the 182 day Notice required in subsection 1 against other healthcare professionals or health facilities involved in the claim;

(B.) The 182 day Notice period has expired as to the health professionals or health facilities described in subpart A;

(C.) The claimant has filed a Complaint and commenced an action alleging medical malpractice against one or more of the health professionals or health facilities described in subpart A; and

(D.) The claimant did not identify and could not have reasonably identified a health professional or health facility to which Notice must be sent under Subsection 1 as a potential party to the action before filing the Complaint."

The Court of Appeals and trial court's current interpretation of MCL 600.2912(b) et seq is inconsistent with MCL 600.2912(b)(3). The Legislature did not intent to create a Notice of Intent to Sue period for a newly discovered health professional added while in suit and then eliminate a Notice of Intent to Sue period for newly discovered health professionals notified prior to suit being filed. It stands to reason that if newly discovered parties are entitled to a Notice of Intent to Sue period while in suit, certainly additional parties or claims asserted within the Statute of Limitations prior to suit being filed would also be entitled to a Notice of Intent to Sue period.

In this case the only Notice of Intent to Sue ever served upon Defendant General Orthopedics, P.C. was sent and/or received on/or about October 12, 2001. In addition, the only Notice of Intent to Sue ever served upon Defendant William Kohen which identified additional claims and injuries was sent and received on October 12, 2001. Therefore, pursuant to MCL 600.2912(b), the Defendants were entitled to the 182 day no suit period prior to the Mayberrys' filing suit. Do the Defendants, General Orthopedics, P.C. and Dr. William Kohen lose their 182 day Notice of Intent to Sue period merely because the Mayberrys' filed a prior Notice of Intent to

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Sue against Defendant Dr. Kohen alleging only one violation of the standard of care? If the Court of Appeals and trial court's opinion is upheld, this would be the result.

It is clear that the Legislature did not intend such an interpretation to take place. Therefore, MCL 600.2912(b)(6) **does not** apply to a Notice of Intent to Sue which is filed and served with the Statute of Limitation when a prior Notice of Intent to Sue had been filed which did not enact the tolling statute of MCL 600.5856(d).

The following example illustrates the clear and palpable error that the Court of Appeals has made in interpreting MCL 600.2912(b). Assume that a Plaintiff files a Notice of Intent to Sue against a physician and he waits the applicable 182 day period. The 182 day no suit period expires prior to the running of the Statute of Limitations, but no suit is filed due to a difficulty in determining the applicable claims and/or parties. Exactly five months prior to the expiration of the Statute of Limitations, it is determined that an additional claim and/or additional party committed the malpractice. The Plaintiff then files a second Notice of Intent to Sue naming the additional party and asserting the additional claim. The Plaintiff must then wait the applicable 182 day no suit period as to that claim and that party prior to filing a Complaint against the added party and asserted claim. However, during this 182 day period the Plaintiff's Statute of Limitations expires. This court's interpretation of MCL 600.2912(b) causes the Plaintiff to forfeit a cause of action as to the additional parties and claims asserted in the Amended Notice of Intent to Sue which had been timely filed within the Statute of Limitations. Such an interpretation fails to promote the clear intent of the Legislature in passing MCL 600.2912(b).

Therefore, pursuant to MCL 600.5856(d), the filing of a Notice of Intent filed when fewer than 182 days remain in the limitation period tolls the applicable limitation period, regardless if a prior Notice of Intent which did not trigger a tolling had been filed.

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OPINION OF COURT OF APPEALS

Pursuant to MCR 7.302(g), attached as Exhibit 2 is the Court of Appeals unpublished memorandum opinion dated February 17, 2004.

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OPINION OF TRIAL COURT

Pursuant to MCR 7.302(f), attached as Exhibit 3 is the Order of the Circuit Court granting Defendants' Motion for Summary Disposition. Also, attached as Exhibit 4 is the transcript of oral argument regarding Defendants' Motion for Summary Disposition dated September 4, 2002.

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RELIEF SOUGHT

As argued above, the Court of Appeal's ruling affirming the Trial Court's dismissal of the Mayberrys' cause of action is clearly erroneous and will cause material injustice. Furthermore, the Court of Appeals decision conflicts with MCL 600.2912(b)(3) in that it is unclear as to why the Legislature would allow for a Notice of Intent to Sue for newly added additional parties in suit and then not allow a Notice of Intent to Sue period for newly added additional parties receiving a Notice of Intent to Sue pre-suit.

The Court of Appeal's decision is clearly erroneous in that it forfeits an additional later named health care facility's statutory right to a Notice of Intent period merely because a given Plaintiff filed a prior Notice of Intent to Sue upon a different health care professional. Furthermore, the Court of Appeals' ruling is erroneous in that it unconstitutionally shortened the Mayberrys' 24 month statute of limitations to 22 months.

Finally, the Court of Appeals' ruling is erroneous as it misapplies MCL600.2912(b)(6) by incorrectly asserting that it forbids a tolling of the Statute of Limitations merely because a prior Notice of Intent to Sue had been filed prior to the Statute of Limitations running.

For the reasons set forth above, the Mayberrys are entitled to a reversal of the Appellate Court's clearly erroneous ruling and remand back to the Circuit Court for further proceedings.

Respectfully submitted,

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Dated: December 30, 2004

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STATE OF MICHIGAN

IN THE SUPREME COURT FOR THE STATE OF MICHIGAN

KEITH W. MAYBERRY and
JOANNA MAYBERRY, his wife,

Plaintiffs/Appellant,

v

Supreme Court No.: 126136
Court of Appeals No. 244162
Oakland Cty Circuit Case No. 02-039236-NH

GENERAL ORTHOPEDICS, P.C.,
a Michigan Professional Corporation, and
DR. WILLIAM M. KOHEN, M.D.,
Jointly and Severally,

Defendants/Appellees.

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PROOF OF SERVICE

STATE OF MICHIGAN)
)SS:
COUNTY OF OAKLAND)

JOSEPH J. CEGLAREK, II, being first duly sworn, deposes and says that on the 30th day of DECEMBER, 2004, he hand delivered, 8 copies of:

PLAINTIFF/APPELLANTS' SUPPLEMENTAL BRIEF
AS REQUESTED BY ORDER OF THIS COURT
PURSUANT TO MCR 7.302

EXHIBITS

PROOF OF SERVICE

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To the Michigan Supreme Court at Michigan Hall of Justice, 925 W. Ottawa, P.O. Box 30052, Lansing, 48909.

Further, JOSEPH J. CEGLAREK, II, delivered via first class mail a copy of Plaintiffs/Appellants' Supplemental Brie as Requested by Order of this Court Pursuant to MCR 7.302, Exhibits and Proof of Service to the following:

JAMES M. PIDGEON, ESQ.
38505 Woodward Ave., Ste. 1000
Bloomfield Hills, MI 48304

CLERK OF THE OAKLAND COUNTY CIRCUIT COURT,
1200 Telegraph Rd
Pontiac, MI 48341

CLERK OF THE COURT OF APPEALS
P.O. Box 30022
Lansing, MI 48909-7522

as disclosed by the pleadings of record.

JOSEPH J. CEGLAREK, II

SUBSCRIBED AND SWORN TO BEFORE ME
THIS _____ DAY OF _____, 2004.

NOTARY PUBLIC P. Bartos
Wayne County, Michigan
My Commission Expires: 12/30/04
acting in Oakland Cty.

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